PEAK RIVER EXPEDITIONS
(ON RECONSIDERATION)

IBLA 85-550 Decided May 29, 1987

Petition for reconsideration of the Board's decision in Peak River Expeditions, 94 IBLA 98 (1986), affirming a decision of the Moab, Utah, District Office, Bureau of Land Management, cancelling permit privileges under special use permit MD-83-0028.

Petition denied.

1. Administrative Authority: Estoppel -- Board of Land Appeals -- Estoppel

The Board of Land Appeals has well-established rules governing consideration of estoppel issues. They are the elements of estoppel described in United States v. Georgia Pacific Co., 421 F.2d 92 (9th Cir. 1970); the rule that estoppel is an extraordinary remedy, especially as it relates to public lands; and the rule that estoppel against the Government must be based upon affirmative misconduct.

2. Special Use Permits

A special use permit is subject to any special condition or stipulation deemed necessary for protection of public interests, including minimum-use requirements. Where BLM notifies a permittee that its permit will be subject to cancellation unless certain described use is made in accordance with a permit stipulation, and the permittee fails to make that required use, the permit is properly cancelled. Allegations discriminatory treatment which are not supported by the case record will not serve as a basis to overturn BLM's action.

APPEARANCES: Robert C. Cummings, Esq., Salt Lake City, Utah, for appellant; David K. Grayson, Esq., Office of the Regional Solicitor, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

In Peak River Expeditions, 94 IBLA 98 (1986), this Board ruled, inter alia, that the Bureau of Land Management (BLM) properly cancelled the permit privileges of Peak River Expeditions (Peak River) under special use permit MD-83-0028 for failure to make minimum use of permit privileges in the

Desolation/Gray Canyons segment of the Green River. Specifically, the Board found: (1) Peak River had "demonstrated a consistently low use of permit privileges in the Desolation/Gray Canyons areas" for several years; (2) BLM twice notified Peak River, by letters dated April 9 and November 30, 1983, that if Peak River failed to make minimum use of its annual allocation (of 400 user days) its permit privileges would be cancelled; and (3) Peak River failed to meet the minimum-use requirement of an average of 200 user days for the 2 consecutive years of 1983 and 1984. Accordingly, the Board affirmed BLM's decision to cancel Peak River's permit privileges as to the Desolation/Gray Canyons segments of the Green River, relying upon Don Hatch River Expeditions, 91 IBLA 291 (1986).

On November 5, 1986, Peak River filed a petition for reconsideration of the Board's decision. In this petition, Peak River makes a number of arguments, the principal ones 1/ being: (1) an evidentiary hearing is necessary in order to resolve an issue of substantive fact, i.e., whether James Kenna, a BLM employee, orally represented that Peak River would be required to utilize its permit to the extent of only 50 percent for each of the 1984 and 1985 seasons; (2) BLM should have followed the provisions of stipulation B.II.E.(5) as a precondition to cancelling Peak River's permit; and (3) BLM's failure to cancel the special use permits of other outfitters who also did not meet the 200 user day minimum-use requirement in the Desolation/Gray Canyons area amounts to unlawful discrimination against Peak River by BLM.

On November 13, 1986, the Board issued an order directing that BLM respond to Peak River's petition. In accordance with that order, on January 20, 1986, counsel for BLM filed a detailed response prepared by the Moab District Office. Subsequently, on February 27, 1987, Peak River filed a thorough reply to BLM's response.

We reject Peak River's first argument on the basis that there are no disputed facts involved in this appeal which are determinative of the legal issues posed. Accordingly, an evidentiary hearing pursuant to 43 CFR 4.415 is unnecessary. See Hondoo River and Trails, 91 IBLA 296, 304 (1986). As BLM points out, the documentary evidence in this case is difficult to reconcile with Peak River's assertion that Kenna orally assured Peak River that it only had to use 50 percent of its allocation. The November 30, 1983, letter

---

1/ Appellant also asserts that it had requested an opportunity to "expand and amplify" its statement of reasons and that, because of alleged difficulties in obtaining documents under the Freedom of Information Act (FOIA), and in reliance on an order of the Board dated June 3, 1985, it had not done so at the time the Board issued its Oct. 1, 1986, decision. It thus characterizes the decision as premature.

The facts, however, disclose that after delays primarily occasioned by appellant, it received the FOIA documents in February 1986. No submission was received by the Board in the ensuing 7 1/2 months. The idea that, merely because appellant had filed a request for an extension, it could proceed leisurely to "expand and amplify" its statement of reasons finds no support in actual practice before the Board. In any event, no prejudice has been shown as appellant's expanded and amplified statement of reasons has failed to convince us that our previous decision was in error.

informing Peak River that if substantial use of 400 user days was not made during the 1984 river season, its permit would be cancelled, directed that Peak River contact Kenna if there were questions concerning the matter. BLM asserts that Peak River's explanation for its failure to meet the requirements of stipulation B.II.E.(6) would involve ignoring the contents of a certified letter received subsequent to an oral representation. There is no documentary evidence whatever that the alleged conversation between Scott Savage of Peak River and Kenna occurred, whereas the file contains extensive documentation of the procedures actually followed by BLM.

[1] In any event, whether Kenna actually represented to Peak River that it needed to utilize only 50 percent of its user days during the 1984 and 1985 seasons is not a factual question which is determinative of the legal issues posed in this case. At best, such an assertion would provide an unconvincing argument that BLM should be estopped from cancelling Peak River's permit. The Board has adopted the elements of estoppel described by the Ninth Circuit Court of Appeals in United States v. Georgia Pacific Co., 421 F.2d 92 (9th Cir. 1970):

> Four elements must be present to establish the defense of estoppel: (1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the facts; and (4) he must rely on the former's conduct to his injury.

Id. at 96 (quoting Hampton v. Paramount Pictures Corp., 279 F.2d 100, 104 (9th Cir. (1960)). See Ptarmigan Co., 91 IBLA 113, 117 (1986). Estoppel is an extraordinary remedy, especially as it relates to public lands. Ptarmigan Co., supra at 117; Harold E. Woods, 61 IBLA 359, 361 (1982). In addition, estoppel against the Government in matters concerning the public lands must be based upon affimative misconduct, such as misrepresentation or concealment of material facts. United States v. Ruby Co., 588 F.2d 687, 703 (9th Cir. 1982); Ptarmigan Co., supra. Finally, estoppel does not lie where the effect of its application would be to grant an individual a right not authorized by law. Id.; Edward L. Ellis, 42 IBLA 66 (1979).

Under these standards, even if we assume, arguendo, that BLM's employee misled Peak River, estoppel would not apply. Even if the first two requirements described in Georgia Pacific were met, the documentary evidence in the case file indicates that Peak River could not have been ignorant of the "true facts." Stipulation B.II.E.(6) establishes the expected standard and the consequences for not meeting it. Moreover, it is questionable whether Peak River could invoke estoppel without the presentation of a written document upon which it purports to rely. As noted by the Supreme Court in Heckler v. Community Health Services, 467 U.S. 51, 65 (1984):

> The appropriateness of respondent's reliance is further undermined because the advice it received from Travelers was oral. It is not merely the possibility of fraud that undermines our confidence in the reliability of official action that is not confirmed or evidenced by a written instrument.

> Written advice, like a written judicial opinion, requires its author to reflect about the nature of the advice that is given to the citizen, and subject that advice to the possibility of review, criticism and reexamination.

Accord United States v. Morris, 19 IBLA 350, 377, 82 I.D. 146, 159 (1975).

[2] Peak River's argument that BLM failed to follow the procedures in stipulation B.II.A.(5) in cancelling its permit pursuant to stipulation B.II.A.(6) must likewise be rejected. Peak River relies upon the following provisions of stipulation B.II.A.(5) in making this argument:

> In case of the specific violation of any provision or special condition of this permit or any otherwise unsatisfactory performance by the permittee under this permit, the BLM may terminate this permit by the following procedures:
>
> (a) The BLM will give the permittee written notice specifying the particulars of the alleged violations or unsatisfactory performance.
>
> (b) Within thirty (30) days after receipt by the permittee of such notice, the BLM will grant to the permittee an opportunity to be heard upon the charges.
>
> (c) If the BLM decides that there has been a violation or unsatisfactory performance, the BLM will give to the permittee written notice of such decision, specifying the particulars thereof.
>
> (d) If the permittee fails or refuses to remedy such violations or unsatisfactory performance within a reasonable period of time fixed by the BLM, the BLM may declare this permit terminated and revoke all privileges thereunder upon such date or upon such contingency as it may deem proper to protect the public interest.

According to Peak River, the letter dated November 30, 1983, does not "allege unsatisfactory performance," and does not "mention * * * the 30-day period for a hearing" (Petition at 6). In addition, Peak River asserts that the requirement stated in the November 30, 1983, letter that it use 400 user days during the 1984 season does not qualify as a reasonable time to remedy its deficiency. Rather, in Peak River's view, it should have been allowed to "make use of its user days over the next two years in such manner as to average 200 per year, or might have been required to so use its user days in the next two years as to average 200 per year for 1983, '84 and '85" (Petition at 7). Thus, Peak River argues that since it used 256 user days in 1984, it could have averaged 218.66 user days for the years 1983, 1984, and 1985, assuming it utilized 400 user days in 1985 (256 plus 400 divided by 3).

Peak River's assertion that BLM's November 30, 1983, letter does not allege "unsatisfactory performance" contradicts the plain wording of the letter itself. In response to Peak River's argument that it was not given a reasonable time to remedy its performance, BLM states that when cancelling a special use permit under stipulation B.II.A.(5) for failure to perform in accordance with B.II.A.(6), BLM must wait until the figures for the first season are available before knowing whether to issue a notice that performance is unsatisfactory, and that sufficient use must be made during the second season for the required average to be met. Thus, "[t]he entire second season, or half of the two year period, was allowed for remedy" (BLM Response at 5). BLM's explanation of stipulation B.II.E.(6) places into context the notice contained in the November 30, 1983, letter that Peak River must utilize 400 user days in 1984:

> The minimum use standard set forth in stipulation B.II.E.(6) was deliberately defined using a yearly minimum of 200 user days. An averaging provision over the two consecutive years was introduced to allow for year-to-year fluctuations while still meeting a minimum level of performance overall. While, as indicated in the petition, an outfitter may meet the requirements of the stipulation by using 400 user days in a single year (one outfitter has), the need to make 400 user days in the second year results from the permittee's decision to make no use the first year. Assuming the permittee is familiar with the permit stipulations, this choice is made with the knowledge that the stipulation requirements will still need to be met.

(BLM Response at 6).

Stipulation B.II.E.(6) provides that "[u]se authorization for [the Desolation/Gray Canyons] will be <u>subject to cancellation</u> if the average use for two consecutive years does not meet the * * * minimum * * *." (Emphasis added). Thus, whether to cancel Peak River's permit privileges was a decision committed to BLM's discretion. While BLM <u>could have</u> reduced Peak River's user-day minimum under stipulation B.II.E.(5), rather than cancelling its permit privileges altogether, the record raises serious doubts about whether Peak River could have redeemed its performance during the 1985 season. BLM recounts Peak River's history of low use of its user-day allocation. During its 11 year history, Peak River failed to make any use of its allocation during 4 years, used fewer than 100 user days during 4 of those years, and between 100 and 200 during the remaining 3 years. In its decision, the Board noted that "by letter dated April 9, 1982, BLM notified Peak River that its allocation was not being effectively used, with no use at all in 1980 and use of only 36 passenger days in 1981." 94 IBLA at 102. The Board fully considered Peak River's argument that BLM was unjustified in cancelling its permit privileges, and Peak River has advanced no evidence which supports reconsideration of its decision on the basis that stipulation B.II.E.(5) was improperly applied.

Based upon the evidence in the record before it, the Board addressed Peak River's argument that stipulation B.II.E.(6) was discriminatory on its face and as applied by BLM in this case, since it allows "more favored permittees" to operate at a lower capacity. The Board concluded that Peak

River "has not established that any operator with an allocation of 400 or more passenger days has an assigned minimum of less than 200 passenger days. When coupled with BLM's authority under stipulation B.II.E.(5), we cannot find that stipulation B.II.E.(6) is discriminatory as applied to appellant." 94 IBLA at 103.

Peak River disagrees with our analysis, submitting a chart which provides statistical information about user-day allocations as opposed to actual use of passenger days for 26 outfitters. The discretion granted to BLM under stipulation B.II.E.(6) militates against Peak River's analysis based on pure numbers. The performance of each outfitter is evaluated taking into account circumstances which are unique to the outfitter. As discussed below, other outfitters might well view BLM's treatment of Peak River as preferential.

As an example, Peak River argues that Rocky Mountain River Expeditions (Rocky Mountain) utilized 64 user days in 1983 and 150 user days in 1984, "less than an average of 200 for the two years" (Petition at 10). According to Peak River, BLM's failure to terminate Rocky Mountain's permit privileges "shows a clear discrimination against Peak." Id. BLM's explanation demonstrates why numbers alone are misleading. In October 1983, Rocky Mountain was sold to International Nautical and Whitewater Expeditions, and procedures were initiated by Rocky Mountain to reassign the permit to the new owners of the business, who had indicated that they would retain the Rocky Mountain name. During the same period, BLM issued a notice letter to the original owners of Rocky Mountain similar to that issued to Peak River, requiring use of 336 user days in 1984 to meet stipulation B.II.E.(6), since Rocky Mountain had used 64 days in 1983. On June 1, 1984, a notice letter was issued to the new owners of Rocky Mountain requiring minimum use over the 1984 and 1985 seasons. A proposed cancellation decision was later issued on December 13, 1984, based on the first notice to the old owners of Rocky Mountain. Rocky Mountain responded to this decision citing the change in ownership and the June 1, 1984, letter as reasons not to cancel the permit. BLM decided not to cancel the permit due to the confusion generated by the June 1, 1984, letter, but leaving the notice requirements in place for the 1984 and 1985 seasons. Rocky Mountain met those requirements by utilizing 306 user days in 1985.

It is unnecessary that we repeat the factual justifications offered by BLM for treating each outfitter as it did. We observe that BLM cancelled the permit privileges of certain outfitters which failed to meet their minimum-use requirements (Chrisports, Hatch River Expeditions, Hondoo Rivers and Trails), and notified others that they had met their minimum-use requirements, thus avoiding cancellation of their permit privileges (Ken Sleight Expeditions and Tex's River Expeditions).

BLM offers factual support for the following discussion, which we think responds cogently to Peak River's discrimination argument:

> Even setting aside mistakes that were made in other cases, a review of the cases handled by BLM demonstrates that Peak was not discriminated against. All commercial river permittees are subject to identical stipulations covering the use requirement of 200 user days per year in Desolation and Gray Canyons. All

> permittees were notified concerning the stipulation when it was added in 1983. All permittees are given the same length of time, two years, under stipulation B.II.E.(6). All permittees [who] were subject to notification based on their 1983 use were issued notice letters. All those who received a potentially adverse decision, were given an additional opportunity to respond to a proposed decision. BLM has made a deliberate effort to ensure that all permittees were treated similarly and fairly.
>
> Peak River Expeditions has received two opportunities, in 1981-1982 and 1983-1984, to correct a long standing lack of use. No other permittee has received two such opportunities. Three other permittees who were subject to cancellation during the same period as Peak, including the permittee with the most similar use history (Hatch River Expeditions) have also had privileges cancelled. Two other permittees who were subject to cancellation did in fact make the required use. No inference of discrimination is suggested by this information unless it would be that Peak received lenient treatment.

(BLM Response at 10-11.)

Under 43 CFR 4.21(c), reconsideration of a decision may be granted by the Board only in extraordinary circumstances where, in its judgment, sufficient reason appears therefor. We have reviewed Peak River's petition, BLM's response, and Peak River's reply and find that Peak River has failed to show sufficient reasons for reconsidering our decision. The comprehensive summary provided by BLM in its response regarding its dealings with appellant summary provided by BLM in its response regarding its dealings with appellant and other permittees indicates appellant was not the subject of any unlawful discrimination by BLM. There is no evidence that appellant was required to adhere to more stringent requirements than others.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petition for reconsideration is denied.

Bruce R. Harris
Administrative Judge

We concur:

John N. Kelly,
Administrative Judge

James L. Burski
Administrative Judge